

United States 16

Circuit Court of Appeals

For the Ninth Circuit.

E. MASSAGLI, Doing Business as SAN FRAN-
CISCO CONCRETE CO., and Also as SAN
FRANCISCO CONCRETE & MOSAIC
WORKS, Alleged Bankrupt,
Appellant,

vs.

T. I. BUTLER CO., a Corporation, J. S. GUERIN
and STEPHEN I. GUERIN, Copartners,
Doing Business Under the Name of J. S.
GUERIN & CO., and GOLDEN GATE
ATLAS MATERIALS CO., a Corporation,
Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the
Northern District of California, Southern Division.

FILED

MAY 31 1922

PAUL H. CURRIER,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD.

For Alleged Bankrupt and Appellant:

TORREGANO & STARK, Esqs., Mills Bldg.,
San Francisco, Calif.

For Petitioning Creditors and Appellees:

BYRON COLEMAN, Esq., and MILTON
NEWMARK, Esq., Crocker Bldg., San
Francisco, Calif.

District Court of the United States, Northern
District of California, Southern Division.

CLERK'S OFFICE.—No. 18022-S.

In the Matter of E. MASSAGLI, Doing Business
as SAN FRANCISCO CONCRETE CO.
and also as SAN FRANCISCO CONCRETE
& MOSAIC WORKS,

Alleged Bankrupt.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of Said Court:

Sir: Please issue certified typewritten copies of
the following papers to be used by the alleged
bankrupt above named in the prosecution of an
appeal to the United States Circuit Court of Ap-
peals:

1. Creditors' petition.
2. Notice of motion to dismiss.

3. Minute order denying motion to dismiss and noting alleged bankrupt's exception.
4. Order of adjudication.

TORREGANO & STARK.

By ERNEST J. TORREGANO,
Attorneys for Alleged Bankrupt

[Endorsed]: Receipt of a copy of the within praecipe is hereby admitted this 17th day of May, 1929.

MILTON NEWMARK.

Filed at 3 o'clock and 15 Min. P. M., May 17, 1929. [1*]

[Title of Court and Cause.]

CREDITORS' PETITION.

To the Honorable Judges of the United States District Court for the Northern District of California:

Come now T. I. Butler Co., a corporation, organized under the laws of the State of California; J. S. Guerin and Stephen I. Guerin, copartners, doing business under the name of J. S. Guerin & Co.; and Golden Gate Atlas Materials Co., a corporation, organized under the laws of the State of California, and respectfully show:

That E. Massagli is, and during all of the times herein mentioned was, doing business under the name of San Francisco Concrete Co. and San Fran-

*Page-number appearing at the foot of page of original certified Transcript of Record.

cisco Concrete & Mosaic Works, of which said businesses said E. Massagli is and was the sole owner.

That said E. Massagli is neither a wage-earner, nor a person engaged chiefly in farming or the tillage of the soil, but is principally engaged in the business of concrete contracting, and has had his principal place of business for the greater portion of six months preceding the date of the filing of this petition in the city and county of San Francisco, State and Northern District of California, and owes debts to an amount in excess of One Thousand (1,000) Dollars, and is insolvent;

That your petitioners are creditors of said E. Massagli, having provable claims amounting in the aggregate in [2] excess of securities held by them, to the sum of Five Hundred (500) Dollars and over. The claims of your petitioners herein referred to are unsecured, and none of your petitioners is entitled to any priority under the provisions of the Acts of Congress relating to bankruptcy, nor has any of your petitioners received any preference as provided in said Acts of Congress relating to bankruptcy.

The nature and amount of your petitioners' claims are as follows:

Goods, wares, and merchandise sold and delivered by said T. I. Butler Co. to E. Massagli, within two years last past, in the sum of One Thousand Two Hundred Twenty-one and $93/100$ (1,221.93) Dollars, no part of which has been paid.

Goods, wares, and merchandise sold and delivered by said J. S. Guerin & Co., a copartnership, to said

E. Massagli, within two years last past, in the sum of Seven Hundred Seven and 40/100 (707.40) Dollars, no part of which has been paid .

Goods, wares, and merchandise sold and delivered by said Golden Gate Atlas Materials Co. to said E. Massagli, within two years last past, in the sum of Forty-six (46) Dollars, no part of which has been paid.

Your petitioners further represent that said E. Massagli is insolvent, and that within four months next preceding the date of this petition, and while insolvent, said E. Massagli committed an act of bankruptcy, in that he did transfer, while insolvent, a portion of his property to one of his creditors, with intent to prefer such creditor over his other creditors, in this: Your petitioners are informed and believe, and on such information and belief allege, that on or about the 2d day of January, 1929, at the city and county of San Francisco, State of California, said E. Massagli did pay over unto Anthony Devoto the sum of One Thousand (1,000) Dollars. Your petitioners [3] allege, on information and belief, that said Anthony Devoto was, then and there, an unsecured creditor of said E. Massagli, and that said moneys so transferred were, then and there, the property of said E. Massagli, and part of his estate, subject to the satisfaction of the claims of his general unsecured creditors, including your petitioners herein. At the time of said transfer said Massagli was indebted to a large number of unsecured creditors, including your petitioner herein, and said transfer was made with in-

tent to prefer said Anthony Devoto over the other unsecured creditors, including your petitioners, and the effect of such transfer is to give to said Anthony Devoto a greater percentage of his indebtedness than the said petitioning creditors.

WHEREFORE, your petitioners pray that service of this petition, together with a subpoena, be made upon E. Massagli, as provided in the Acts of Congress relating to bankruptcy, and that he may be adjudged by the Court to be a bankrupt within the purview of said Acts; and for such other order as is proper in the premises.

T. I. BUTLER CO.

By T. I. BUTLER,

President.

J. S. GUERIN & CO.

By STEPHEN I. GUERIN,

Member of Said Copartnership.

GOLDEN GATE ATLAS MATERIALS CO.

By CARROLL STEPHENS,

Assistant Secretary.

BYRON COLEMAN,

MILTON NEWMARK,

Attorneys for Petitioner. [4]

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

T. Butler, being first duly sworn, deposes and says: That he is an officer, to wit, the president of T. I. Butler Co., a corporation, one of the petitioners mentioned in the foregoing petition, and

that he has read said petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

T. I. BUTLER.

Subscribed and sworn to before me this 28th day of March, 1929.

[Seal] THOMAS A. DOUGHERTY,
Notary Public in and for the City and County of
San Francisco, State of California.

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

Stephen I. Guerin, being first duly sworn, deposes and says: That he is a member of the copartnership of J. S. Guerin & Co., one of the petitioners mentioned in the foregoing petition; that he has read said petition, and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

STEPHEN I. GUERIN.

Subscribed and sworn to before me this 28th day of March, 1929.

[Seal] THOMAS A. DOUGHERTY,
Notary Public in and for the City and County of
San Francisco, State of California. [5]

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

Carroll Stephens, being first duly sworn, deposes and says: That he is an officer, to wit, the assistant secretary of Golden Gate Atlas Materials Co., a corporation, one of the petitioners mentioned in the foregoing petition; that he has read said petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

CARROLL STEPHENS.

Subscribed and sworn to before me this 28th day of March, 1929.

[Seal] THOMAS A. DOUGHERTY,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Mar. 30, 1929, at 10 o'clock
and 40 min. A. M. [6]

[Title of Court and Cause.]

NOTICE OF MOTION TO DISMISS.

To T. I. Butler Co., a Corporation, J. S. Guerin and
Stephen I. Guerin, Copartners, Doing Business
Under the Name of J. S. Guerin & Co. and
Golden Gate Atlas Materials Co., a Corporation,
and to Messrs. Byron Coleman and Milton New-
mark, Their Attorneys:

You and each of you will please take notice, and you are hereby notified:

That on Monday, the 15th day of April, 1929, at the hour of 10 o'clock A. M., or as soon thereafter as counsel can be heard, before Hon. A. F. St. Sure, Judge of the above-entitled court, E. Massagli, respondent herein, will move the above-entitled court for an order dismissing the above-entitled proceedings upon the following grounds:

1. That it appears on the face of said petition that the Court is without jurisdiction to grant the relief prayed for in said petition.

2. That said petition does not state facts sufficient to warrant the Court to make or enter an order of adjudication herein or to grant the relief prayed for in said petition.

3. That said petition is not verified in accordance with the general orders and the form prescribed and promulgated by [7] the United States Supreme Court, pursuant to the provisions of the Bankruptcy Act.

4. That it cannot be ascertained from said petition, nor does it appear therein, what act of bankruptcy it is alleged that said respondent has committed.

5. That it cannot be ascertained from said petition, nor does it appear therein, if the said Anthony Devoto, the person to whom it is alleged the respondent transferred certain sums of money, was a general unsecured creditor holding an antecedent claim, or whether said transfer was made for a present consideration.

WHEREFORE, said respondent E. Massagli prays that the above-entitled court make and enter its order herein dismissing said petition of said petitioning creditors, and for such further and other order as may be just and proper in the premises.

Dated this 11th day of April, 1929.

TORREGANO & STARK.

By ERNEST J. TORREGANO,
Attorneys for Respondent. [8]

[Title of Court and Cause.]

ORDER SHORTENING TIME FOR SERVICE
OF NOTICE OF MOTION TO DISMISS.

GOOD CAUSE APPEARING THEREFOR, IT IS HEREBY ORDERED that the time within which to serve the foregoing notice of motion be, and the same is, hereby shortened so that the same may be served upon the attorneys for said petitioning creditors on or before the 12th day of April, 1929.

Dated this 11th day of April, 1929.

A. F. ST. SURE,
District Judge.

[Endorsed]: Receipt of a copy of the within notice of motion, order shortening time, and copy of order extending time is hereby admitted this 11 day of April, 1929.

MILTON NEWMARK,
Attorney for Petn. Creditors.

Filed Apr. 11, 1929, at 3 o'clock and 40 min.
P. M. [9]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the city and county of San Francisco, on Monday, the 15th day of April, in the year of our Lord one thousand nine hundred and twenty-nine. Present: The Honorable A. F. ST. SURE, District Judge.

[Title of Cause.]

MINUTES OF COURT—APRIL 15, 1929—ORDER DENYING MOTION TO DISMISS PETITION.

This matter came on this day for hearing on motion to dismiss petition, and after argument, the Court ORDERED that said motion be and the same is hereby denied, and an exception allowed to the ruling of the Court. [10]

[Title of Court and Cause.]

ORDER OF ADJUDICATION.

At San Francisco, in said District, on the 22d day of April, 1929, before the said Court in Bankruptcy, the petition of T. I. Butler Co., a corporation; J. S. Guerin & Co.; and Golden Gate Atlas

Materials Co., a corporation, that E. Massagli, doing business as San Francisco Concrete Co., and also as San Francisco Concrete & Mosaic Works, be adjudged bankrupt, within the true intent and meaning of the Acts of Congress relating to Bankruptcy, having been heard and duly considered, and it appearing to the Court that service of said petition with a writ of subpoena has been duly served on the alleged bankrupt and that the last day upon which pleadings may be filed has expired and no such pleadings have been filed by any parties hereto, it is hereby ordered that said E. Massagli, doing business as San Francisco Concrete Co., and also as San Francisco Concrete & Mosaic Works be and is hereby declared and adjudged bankrupt accordingly.

It is thereupon ORDERED that said matter be referred to Thos. J. Sheridan one of the referees in bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and that the said E. Massagli shall attend before said referee on the 3d day of May, 1929, at his office in San Francisco, California, at 10 o'clock forenoon and [11] thenceforth shall submit to such orders as may be made by said referee or by this Court relating to said matter in bankruptcy.

It is further ORDERED that all notices required to be published in the above-entitled matter, and all orders which the Court may direct to be published be inserted in "The Recorder" a newspaper published in the county of San Francisco, State of

California, within the territorial district of this Court, and in the county within which said bankrupt resides.

Dated, April 22, 1929.

A. F. ST. SURE,
District Judge.

[Endorsed]: Filed at 11 o'clock and — min. A. M.
Apr. 22, 1929. [12]

[Title of Court and Cause.]

PETITION FOR APPEAL.

To the Honorable A. F. ST. SURE, District Judge:

The above-named respondent, feeling aggrieved by the order of adjudication in the above-entitled case made and entered on the 22d day of April, 1929, does hereby appeal from said decree and order to the Circuit Court of Appeals, for the Ninth Circuit, for the reasons set forth in the assignment of errors filed herewith, and he prays that his appeal be allowed, and that a citation be issued as provided by law, and that a transcript of the records, proceedings, and documents upon which said order was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit under the rules of such Court in such cases made and provided;

AND YOUR PETITIONER FURTHER PRAYS that the proper order relating to the required security to be required of him be made.

TORREGANO & STARK.

By ERNEST J. TORREGANO,
Attorneys for Alleged Bankrupt.

Appeal allowed upon giving bond, as required by law, for the sum of two hundred and fifty dollars.

Dated this 10th day of May, 1929.

A. F. ST. SURE,
District Judge. [13]

[Endorsed]: Filed May 10, 1929, at 11 o'clock and 50 min. A. M. [14]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes the alleged bankrupt above named and files the following assignment of errors upon which he will rely during prosecution of appeal in the above-entitled cause from the order of adjudication made and entered by this Honorable Court on the 22d day of April, 1929, and says that the Court erred in making and entering the order of adjudication:

1. Because the alleged bankrupt above named filed timely objection to the creditors' petition, filed his motion to dismiss same, and asserted that it appeared on the face of said petition that the Court was without jurisdiction to grant the relief prayed

for in said petition, which motion was denied and exception noted.

2. Because the alleged bankrupt above named filed timely objection to the creditors' petition, filed his motion to dismiss same, and asserted that it appeared that the Court was without jurisdiction to grant the relief prayed for in said petition, the allegations of the act of bankruptcy being on information and belief, and no reason being stated in said petition as to why they could not be made on positive knowledge, which motion was denied and exception noted. [15]

3. Because the alleged bankrupt above named filed timely objection to the creditors' petition, filed his motion to dismiss same, and asserted that said petition did not state facts sufficient to warrant the Court to make or enter an order of adjudication herein or to grant the relief prayed for in said petition, which motion was denied and exception noted.

4. Because the alleged bankrupt above named filed timely objection to the creditors' petition, filed his motion to dismiss same, and asserted that said petition was not verified in accordance with the general orders and the form prescribed and promulgated by the United States Supreme Court, pursuant to the provisions of the Bankruptcy Act, which motion was denied and exception noted.

5. Because the alleged bankrupt above named filed timely objection to the creditors' petition, filed his motion to dismiss same, and asserted that it could not be ascertained from said petition, nor did

it appear therein, what act of bankruptcy said respondent had committed, which motion was denied and exception noted.

6. Because the alleged bankrupt above named filed timely objection to the creditors' petition, filed his motion to dismiss same, and asserted that it could not be ascertained from said petition, nor did it appear therein, whether the said Anthony Devoto, the person to whom it was alleged the respondent transferred certain sums of money, was a general unsecured creditor holding an antecedent claim, or whether said transfer was made for a present consideration, which motion was denied and exception noted.

7. Because the alleged bankrupt above named filed timely objection to the creditors' petition, filed his motion to dismiss same, which motion was denied and exception noted, and [16] notwithstanding said objection the above-entitled court made and entered its order of adjudication as aforesaid, although no amended petition was filed, properly verified, in accordance with the general orders and the form prescribed and promulgated by the United States Supreme Court, nor setting forth the allegation of the commission of the act of bankruptcy on the petitioner's positive knowledge.

WHEREFORE, the bankrupt above named prays that said order of adjudication heretofore made and entered by this Honorable Court be reversed, and that the said District Court be directed to enter an order dismissing the petition of T. I. Butler Co., a corporation, Golden Gate Atlas Mate-

rials Co., a corporation, and J. S. Guerin and Stephen I. Guerin, copartners, doing business under the name of J. S. Guerin & Co.

TORREGANO & STARK.

By ERNEST J. TORREGANO,

Attorneys for Petitioner.

[Endorsed]: Filed May 10, 1929, at 11 o'clock and 55 min. A. M. [17]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT ON APPEAL,

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 17 pages, numbered from 1 to 17, inclusive, contain a full, true and correct transcript of the records and proceedings in the matter of E. Massagli, etc., in Bankruptcy, No. 18,022-S, as the same now remains on file and of record in this office.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of six dollars and twenty cents (\$6.20) and that the same has been paid to me by the attorney for the appellant herein.

Annexed hereto is the original citation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 22d day of May, A. D. 1929.

[Seal]

WALTER B. MALING,
Clerk,

By C. M. Taylor,
Deputy Clerk. [18]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States, to T. I. Butler Co., a Corporation, J. S. Guerin and Stephen I. Guerin, Copartners, Doing Business Under the Name of J. S. Guerin & Co., and Golden Gate Atlas Materials Co., a Corporation, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, wherein E. Masaghi, doing business as San Francisco Concrete Co., and also as San Francisco Concrete & Mosaic Works, alleged bankrupt, is appellant, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in

the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable A. F. ST. SURE,
United States District Judge for the Northern District of California, this 10th day of May, A. D. 1929.

A. F. ST. SURE,
United States District Judge.

Receipt of a copy of the within citation on appeal and a copy of assignments of error, now on file, is hereby admitted this 17th day of May, 1929.

MILTON NEWMARK,
Attorney for T. I. Butler Co., J. S. Guerin and
Stephen I. Guerin, and Golden Gate Atlas Materials Co.

[Endorsed]: Citation on Appeal. Filed at 3 o'clock and 15 min. P. M., May 17, 1929. [19]

[Endorsed]: No. 5828. United States Circuit Court of Appeals for the Ninth Circuit. E. Massagli, Doing Business as San Francisco Concrete Co., and also as San Francisco Concrete & Mosaic Works, Alleged Bankrupt, Appellant, vs. T. I. Butler Co., a Corporation, J. S. Guerin and Stephen I. Guerin, Copartners, Doing Business Under the Name of J. S. Guerin & Co., and Golden Gate Atlas Materials Co., a Corporation, Appel-

ees. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed May 23, 1929.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

